

Supreme Court, U.S.

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No. 87-1853

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

MICHAEL LAURITZEN and
MARILYN LAURITZEN, Individually and doing
business as LAURITZEN FARMS,

Petitioners,
vs.

ANNE D. MC LAUGHLIN, Secretary of Labor,
United States Department of Labor,

Respondent.

On a petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITIONERS' BRIEF IN REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION
TO CERTIORARI

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Dated: September 22, 1988

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1.2. *Constitutive and functional models in wider ecological systems* by V. G. Kondratenko and V. V. Slobodkin. *Ecological Modelling* 1992, 57, 1-12. This paper is concerned with the question of how best to model the dynamics of ecosystems. It is argued that the most appropriate approach is to model the system as a complex adaptive system, with the components being coupled through their interactions with each other and with the environment. The paper also discusses the concept of self-organization and its role in ecosystem dynamics.

1.3. *Complex systems and ecosystem dynamics* by J. D. Schaffer. *Ecological Modelling* 1992, 57, 13-24. This paper is concerned with the question of how best to model the dynamics of ecosystems. It is argued that the most appropriate approach is to model the system as a complex adaptive system, with the components being coupled through their interactions with each other and with the environment. The paper also discusses the concept of self-organization and its role in ecosystem dynamics.

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Petitioners come before this Court seeking
review of the Seventh Circuit's affirmation¹ of

¹ Sec'y of Labor, U.S. Dept of Labor v
Lauritzen, 835 F2d 1529 (7th Cir 1987).

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the District Court's adjudication,² by summary judgment, that the relationship between Petitioners and the migrant families who contract to hand harvest Petitioners' pickle crop is one of employment rather than of independent contractor. In their Petition for Certiorari, Petitioners complain that (a) genuine issues of material fact preclude a grant of summary judgment, and (b) the Seventh Circuit misconstrued and misapplied standards promulgated in Rutherford Food Corp v McComb, 331 US 722 (1946), United States v Silk, 331 US 704 (1946), and Goldberg v Whitaker House Corp, 366 US 28, 33 (1960) for ascertaining the presence of an employment relationship within the meaning of the Fair Labor Standards Act of 1938, 29 USC §201, and in so doing created a direct and irreconcilable conflict with the Sixth Circuit decision of Donovan v Brandel, 736 F2d 1114 (6th Cir 1984).

²Brock v Lauritzen, 624 F Supp 966 (E.D. Wis 1985).

Respondents' brief, filed in opposition, details the factual findings recited by the Court of Appeals, and then, in harmony with both lower courts, denies the presence of disputed material facts, contending that such facts as may be in dispute are not outcome determinative in nature.³ Respondent attempts to distinguish the difference in results between Brandel and the decisions below with the argument that the two cases are not "factually identical." Respondent denies any conflict exists between the Sixth and Seventh Circuits, asserting that each Circuit "applied the very same legal principles and specific criteria."⁴

Petitioners will rest on their Petition with respect to whether summary judgment was granted in the face of disputed material facts. It is primarily to demonstrate the lack of merit in Respondent's contention that the two circuits

³ Respondent's Brief, pg. 16.

⁴ Respondent's Brief, pg. 15.

applied the same legal standard that Petitioners file their brief in reply.

I. THE DIRECT AND IRRECONCILABLE CONFLICT BETWEEN THE DECISION BELOW AND DONOVAN v BRANDEL, 736 F2d 1114 (6th CIR 1984) NECESSITATES REVIEW AND CLARIFICATION OF THE APPLICABLE STANDARDS FOR ASCERTAINMENT OF AN EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT OF 1938, 29 USC §201 ET SEQ.

Respondent disputes the necessity for review by this Court, contending that (a) factual dissimilarity explains the outcome differences⁵ between the decisions below and Brandel and (b) both Circuits, rather than acting in contradiction, "applied the very same principles and specific criteria"⁶ of law. Moreover, Respondent suggests that Brandel will be largely ignored and in its isolation will have little, if any, precedential value.

Respondent's perception of factual dissimilarity between the cases, is not shared

⁵ Respondents brief, pg. 14.

⁶ Respondent's brief, pg. 15.

Stromlinien sind überwiegend nach unten ausgerichtet
Werte ab 3000 sind null

Unterschiede zwischen den Stromlinien sind deutlich, z.B.
die Stromlinien unterhalb der Welle sind horizontal
orientiert und die oberen Stromlinien sind diagonal
orientiert. Dies ist wahrscheinlich auf die unterschiedliche
Windgeschwindigkeit und die unterschiedlichen Windrichtungen
der beiden Stromlinien hinzu zu führen. Die untere Stromlinie hat
eine Windgeschwindigkeit von 10 m/s und eine Windrichtung von 90°
und die obere Stromlinie hat eine Windgeschwindigkeit von 10 m/s und eine Windrichtung von 180°.

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und die obere Stromlinie hat eine Windgeschwindigkeit von 10 m/s und eine Windrichtung von 180°.

by the courts below. The Seventh Circuit specifically noted the factual similarity of the present case with Brandel.⁷ We differ, said the Seventh, in that "...we view the factual similarities differently than did the Brandel court."⁸ The District Court distinguished Brandel not because of factual dissimilarity but rather because, in the lower court's opinion, the Brandel perception of facts did not accord with the "...economic reality of migrant cucumber pickers."⁹

If there is a factual difference between the instant case and Brandel, it is quantitative only and attributable to the comprehensive trial record made in Brandel¹⁰ -- an opportunity wrongfully denied to Petitioners.

⁷ 835 F2d at 1536.

⁸ 835 F2d at 1336.

⁹ 624 F Supp at 969.

¹⁰ Brandel, supra at 1118,1120.

Judge Easterbrook, in his concurrence¹¹ below, expressed the presence of a conflict between the circuits most succinctly:

... Are cucumber pickers "employees" for purposes of the Fair Labor Standards Act? Donovan v Brandel, 736 F.2d 1114 (6th Cir. 1984), says "no" as a matter of law. My colleagues say "yes" as a matter of law. Both opinions march through seven "factors" - each important, none dispositive.

If then, as Judge Easterbrook observes, and as Respondent contends and Petitioners agree, both circuits paid homage to the same legal principles, the same seven "factors," why the necessity for review?

The necessity for review lies with the fact that the Sixth and Seventh Circuits have given wholly different definition to the applicable legal standards promulgated by this Court such that any similarity of application

¹¹ 835 F2d at 1539.

exists in name only and not in consequence or results.

This Court has directed that the ultimate question, when considering whether a work relationship is one of employment for purposes of FLSA, is whether, given the circumstances of the whole activity, it is "economically realistic" to view the relationship as one of a dependency upon the business to which services are rendered. United States v Silk, 331 US 704, 713 (1946); Goldberg v Whitaker House Cooperative, 336 US 28, 33 (1961); Rutherford Food Corp v McComb, 331 US 722, 730 (1946); Bartels v Birmingham, 322 US 126, 130 (1946).

To assist courts in resolving this ultimate question, this Court prescribed certain guidelines or evaluation standards, nonexclusive and none by itself controlling. These standards include consideration of the permanency of the relationship, the skill required, the investment in the facilities for work, the opportunity for loss and profit from the

the movement of the time after 1850 has
been called

Americanism, and the leading men were called Americanists.

The movement had its origin in the New England States, particularly

in Massachusetts, and subsequently spread to the other New England States, and then to the Middle Atlantic States, and finally to the West.

The movement was at first purely political, and was first

of a national character, but it soon became more and more a movement of a religious character.

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activity involved, the degree of control exercised over the details of the service rendered, the risk undertaken, and the extent of integration of the service rendered into the totality of the business. United States v Silk, supra at 716, 719; Bartels v Birmingham, supra at 130; Rutherford Food Corp v McComb, supra at 729.

Both the Sixth and Seventh Circuit acknowledge these guidelines as their decisional point of departure.¹² The definitions that each Circuit gives to the standards, however, are so unrelated and so divergent as to make wholly fictional any contention that the Circuits use the same scale for weighing a work relation. And it is this difference of definition, Petitioners urge, that warrants, if not compels, the exercise of review and necessitates a revisit to Silk and Rutherford for

¹² Brandel, supra at 1117; 835 F2d at 1535.

purposes of definitional clarification and instruction in technique of application.

And the differences between the two Circuits in definitional application of the standards is wholesale. To illustrate, Petitioners contrast the treatment given several of the standards by the two Circuits:

The Investment factor:

Supreme Court -
never has been clearly
defined

6th Circuit¹³ -
capital necessary for the
task to be performed by
worker

7th Circuit¹⁴ -
capital investment of the
worker relative to the cap-
ital investment of the
whole enterprise

¹³ Brandel, supra at 1118.

¹⁴ 835 F2d at 1537.



The Control factor:

Supreme Court¹⁵ -

degree of employer control
over how the "work shall be
done"

6th Circuit¹⁶ -

degree of employer control
over details of the task

7th Circuit¹⁷ -

degree of employer control
of the entire enterprise

The Opportunity for Profit and Loss factor:

Supreme Court¹⁸ -

opportunity to profit from
"sound management"

6th Circuit¹⁹ -

opportunity for profit from
successful management of
the contracted task

7th Circuit²⁰ -

return on worker's invested
capital

¹⁵ United States v Silk, supra at 714.

¹⁶ Brandel, supra at 1119.

¹⁷ 835 F2d at 1536.

¹⁸ United States v Silk, supra at 719.

¹⁹ Brandel, supra at 1119.

²⁰ 835 F2d at 1536.



Skill factor:

Supreme Court - undefined

6th Circuit²¹ -

workers' skill to be evaluated relative to task involved

7th Circuit²² -

worker must possess a high degree of specialized skill

The above illustrations point, partially, to the reason why, when given nearly identical fact situations, the two circuits traveled perpendicular paths to a legal result. And they further illustrate why, unless review is had and clarification given, similar factual situations within the two circuits will continue to experience dissimilar results. Without the intervention of this Court, the process pickle industry within the Sixth Circuit will continue to function as one of independent contractor, with the consequences that attend

²¹ Brandel, *supra* at 1118.

²² 835 F2d at 1537, 1541.

such relationship, while the same industry, operating in the same mode within the Seventh Circuit is now classified an employment relationship and sustains the different consequences that attend that classification. The appellate Opinion below is a patent and avowed exercise by the Seventh Circuit in a point-by-point disagreement with Brandel as to proper definition of the applicable legal standards.

This Court has recognized the Congressional desire for national uniformity when testing for employment relationships.²³ This Court also appreciates the difficulty of extracting an exact prescription for defining the limits of an employment relationship.²⁴ And this Court has consistently recognized that it was not the legislative purpose to include within the category of employee all those who may perform service for another or to entirely

²³ Board v Hearst Publications, 322 US 111, 124 (1943).

²⁴ United States v Silk, *supra* at 716.

the first time that I have seen the "Giant" - it is
a very large tree, and I have never seen one so
large before. It is about 100 feet high, and has
a trunk diameter of about 12 feet. The bark
is very rough and scaly, and the leaves are
large and broad. The flowers are white and
fragrant. The fruit is a small, round, yellow
berry. The tree is found in the forests of
Central America, particularly in the
mountainous regions of Costa Rica and
Panama. It is a valuable timber tree,
and is also used for its fruit and
medicinal properties.

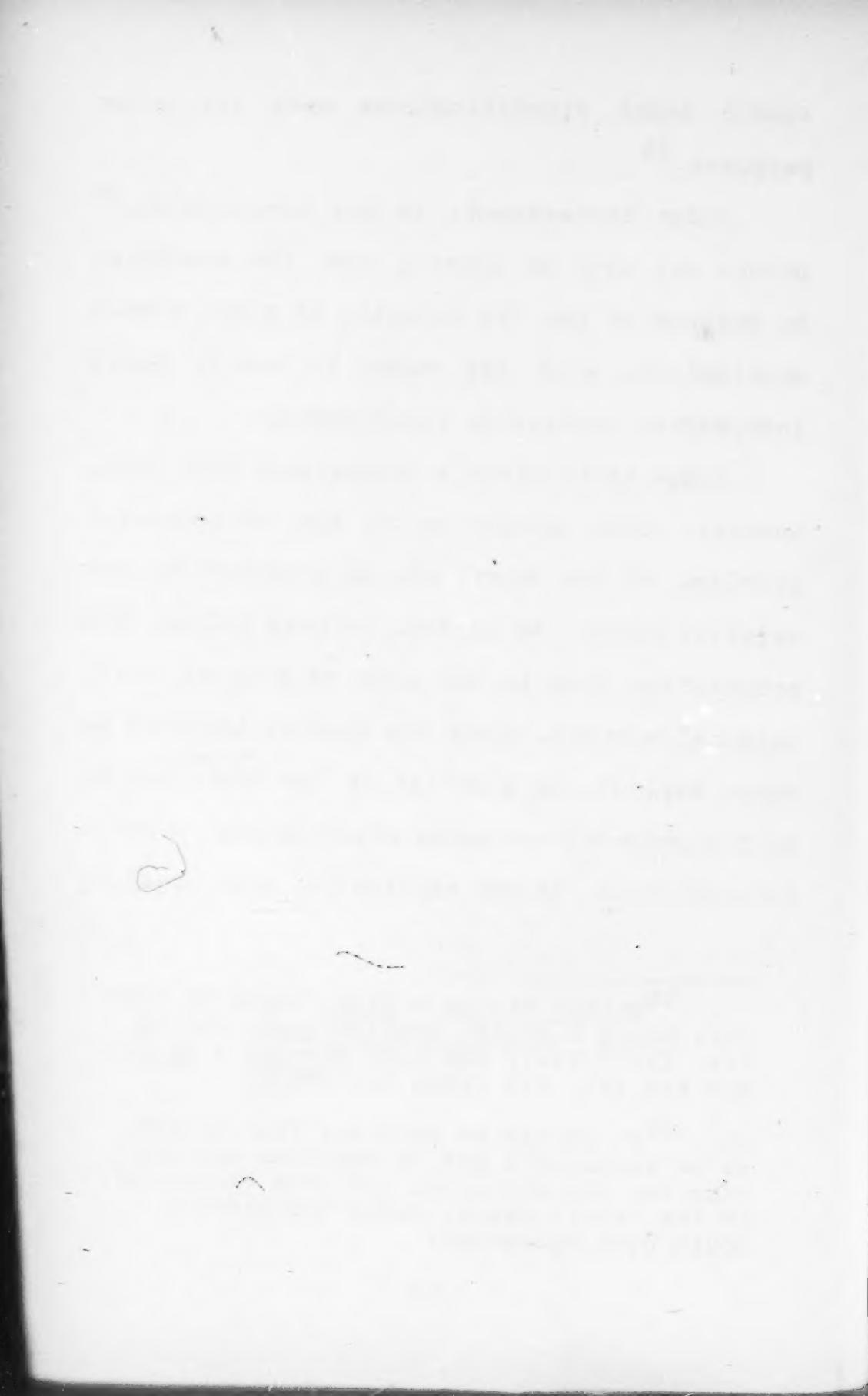
ignore legal classifications made for other purposes.²⁵

Judge Easterbrook, in his concurrence,²⁶ points out ever so acutely that the standards as defined by the 7th Circuit, if given common application, will lay waste to nearly every independent contractor relationship.

Judge Easterbrook's concurrence does more, however, than merely point the precedential problems of the standards as preached by the majority panel. He raises, in bold relief, the proposition that in the case of migrant agricultural workers, where the capital involved is human capital, as a matter of law there can be no independent contractor relationship, a point inferentially, if not explicitly, also urged by

²⁵ United States v Silk, supra at 711-714; Board v Hearst Publications, 322 US 111, 124 (1943); see also Wheeler v Hurd, 825 F2d 257, 275 (10th Cir 1987).

²⁶ It should be apparent that except as he espoused a per se employee designation for all migrants, and thus concurred in the result below, Judge Easterbrook would have dissented.



Respondent Secretary. The Secretary's territorial push for a per se treatment of the entire migrant agricultural labor force as employees subject to FLSA was recognized in Brandel²⁷ and there denied as a concept inconsistent with the case-by-case approach mandated by this Court in Rutherford.

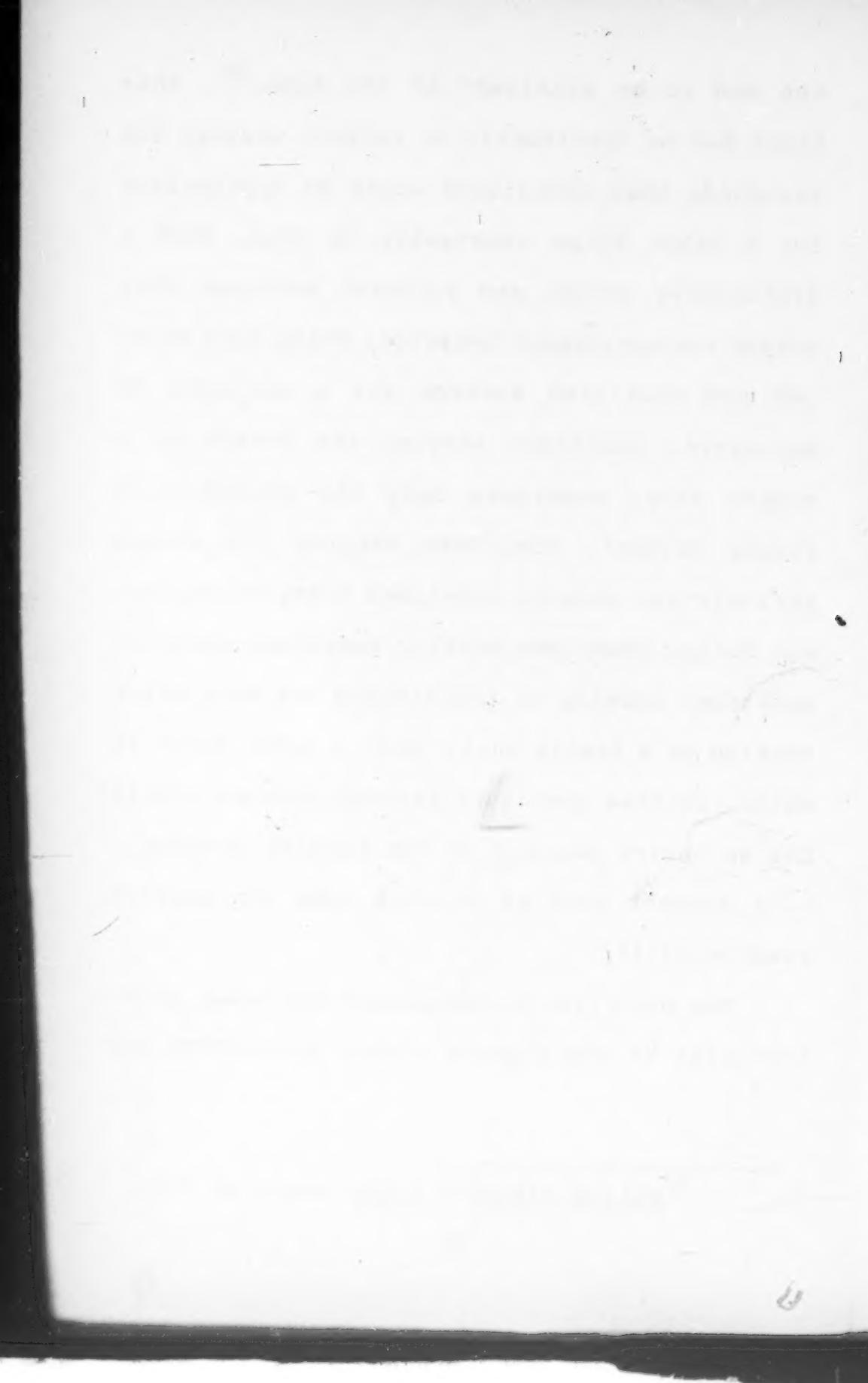
The phenomenon of a transitory stream of temporary farm labor flowing out of Texas and Florida, north and west, to plant, raise and harvest agricultural products -- primarily fruits and vegetables -- post dates the decisions of the 1940 that framed the standards in use today to evaluate an employment relationship. The labor market contemplated by Silk and Rutherford did not include the migrant labor force. It was primarily a manufacturing and commercial labor environment that was considered relative to the "mischief to be corrected and

²⁷ Brandel, supra at 1120.

the end to be attained" of the FLSA.²⁸ This Court had no opportunity to reflect whether the standards then enunciated would be appropriate for a labor force constantly in flux, with a distinctive social and cultural heritage that shaped its employment behavior; doing both skilled and unskilled service for a multiple of employers; sometimes staying the season of a single crop, sometimes only the period of a single harvest, sometimes staying the entire agricultural season; sometimes changing employers daily, sometimes weekly, sometimes monthly; sometimes working as individuals but more often working as a family unit. And, a labor force in which families sometimes assumed responsibility for an entire segment of the farming process -- a segment such as in this case the harvest responsibility.

The 6th Circuit recognized the labor peculiarities of the migrant pickle harvesters and

²⁸ United States v Silk, *supra* at 713.



took those peculiarities into consideration when applying the standards to determine the economic reality of the situation before it.²⁹ The Seventh Circuit majority, however, applied the standards as if dealing with an industrial labor force and consequently, and summarily, relegated all migrants into the coverage under the Act. Judge Easterbrook, alone on the panel, recognized that the standards, as applied below, have little functional relevancy to migrants entrusted with an entire harvest responsibility.

Should this Court refuse to review the decisions below, it jeopardizes, if not wholly disrupts, the traditional industry practice of contracting the entire responsibility of the pickle harvest to skilled migrant families for the economic benefit of all concerned. (Appendix 61a). The instant proceeding, as in Brandel, does not involve employer "mischief" perpetrated on migrant workers contractually

²⁹ Brandel, supra, particularly at 1117 and 1119.

unable to fend for their own economic best interests.³⁰ The Seventh Circuit, as the Sixth, could find no social or economic necessity in the context of the facts before them that, of itself, would warrant inclusion within FLSA. With the courts below, it was merely a matter of the mechanical application of standards so narrowly and technically refined as to emasculate even the pretense of economic reality.

Petitioner respectfully submits that the time is ripe, and the need is urgent, that this Court give a rebirth to the standards by which lower courts are to be guided in the ascertainment of employment relationships under FLSA and statutes of like ilk. The migrant labor force now faces a total disfranchisement from independent contractor relationships and suffers the real prospect of a socially demeaning and

³⁰ Both Brandel and the decision below recognize the economic benefits to the migrants involved in the independent contractual relationship. Brandel, supra at 1120; 835 F2d at 1538.



stereotype classification that condemns them forever as menial labor.

Farm work performed by migrant workers is unskilled labor. There can be no argument to the contrary on this issue.

Donovan v Gillmor, 535 F Supp 154, 162 (ND Ohio 1982)

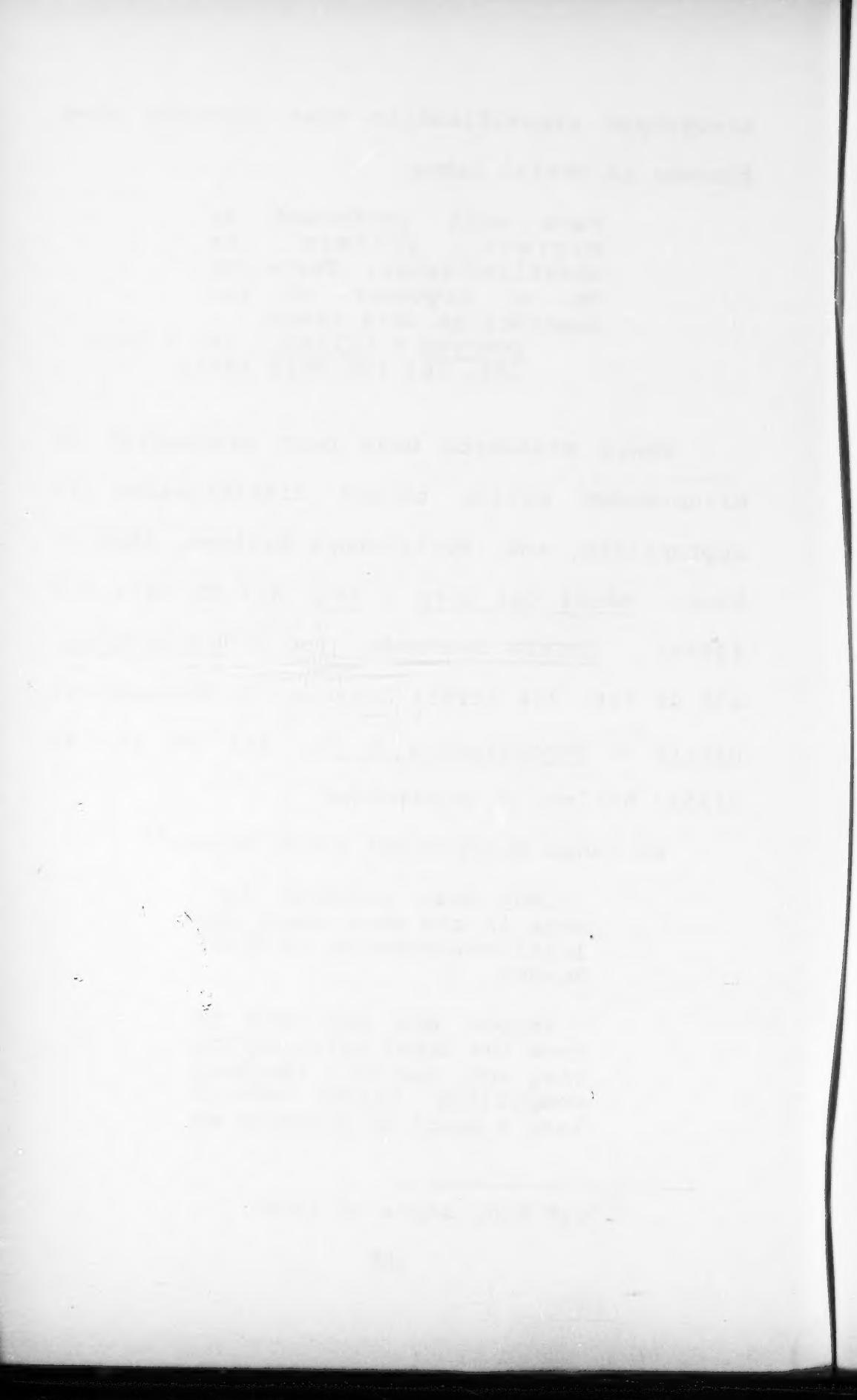
Where standards have been misapplied or misappended action toward clarification is appropriate, and, Petitioners believe, imperative. Mobil Oil Corp v FPC, 417 US 283, 310 (1973). Icicle Seafoods, Inc v Worthington, 475 US 709, 716 (1985) Stevens, J. Dissenting; Harris v Pennsylvania R Co, 361 US 15, 28 (1959) Harlan, J. Dissenting

As Judge Easterbrook noted below:³¹

...Why keep cucumber farmers in the dark about the legal consequences of their deeds?

People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an

³¹ 835 F2d, supra at 1539.



approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate risk and help people save costs.

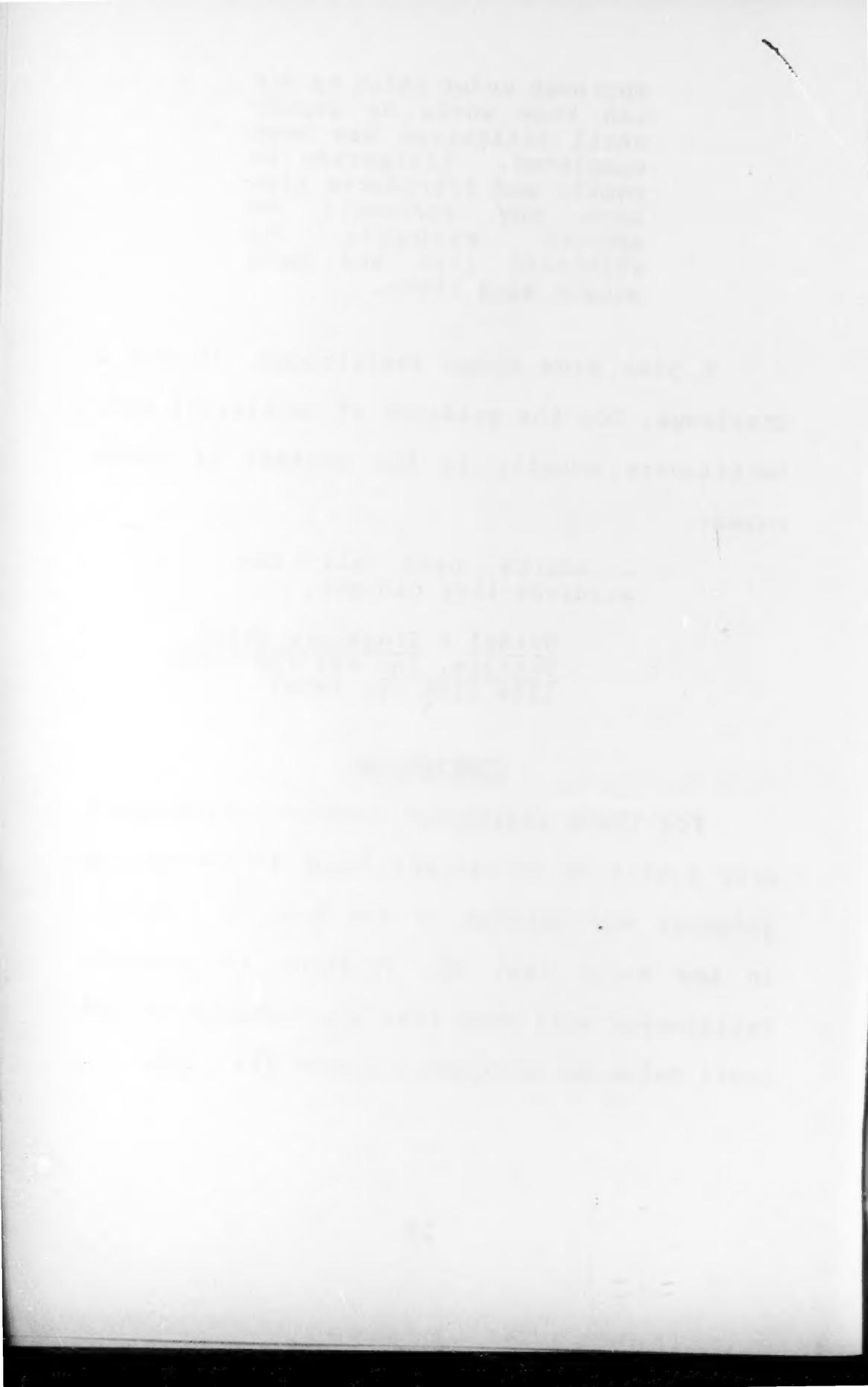
A plea from Judge Easterbrook, if not a challenge, for the guidance of certiorari and, Petitioners submit, in the context of these cases:

...courts need all the guidance they can get.

Weisel v Singapore Joint Venture, Inc 602 F2d 1183, 1189 (5th Cir 1979).

CONCLUSION

For these additional reasons, Petitioners pray a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit. In the event that the Petition is granted, Petitioners will pray that the judgment of the Court below be reversed and that the cause



remanded for trial in accordance with the instructions of this Court.

Respectfully submitted,

DATED: September 22, 1988

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